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No. 84-1833

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

MICHAEL DRAPE,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner respectfully submits this response to the Government's Memorandum in Opposition on the grounds that:

1. The Memorandum asserts erroneously that Petitioner did not raise the claim that his grand jury testimony was literally true and, at most, unresponsive before the trial court and court of appeals.

2. The Memorandum contains an inaccurate portrayal of Petitioner's trial testimony.

3. The Memorandum does not adequately identify the time of creation of Government Exhibit 4; first attempting to describe Exhibit 4 as a copy of Government Exhibit 2, then dismissing the date of creation as irrelevant to the issues in the case.

Petitioner respectfully submits that the Government's errors in the Memorandum are not substantiated by the record. Without burdening the Court with a re-argument of the issues, Petitioner feels compelled to clarify these statements.

1. The Government contends that Petitioner did not assert the claim that his grand jury testimony was literally true and at most, unresponsive before the lower courts.

A look at the trial record reveals that Petitioner filed motions to dismiss for failure to state an offence, to dismiss because questions before the grand jury were vague and subject to misunderstanding or misinterpretation and to dismiss because the questions before the grand jury were hypothetical. These motions were overruled on February 21, 1984, the first day of the trial. Nonetheless, the issues were raised in the Appellant's brief filed in the United States Court of Appeals for the Eighth Circuit on July 13, 1984.

Petitioner contends that the three motions constitute the essential elements of *Bronston v. United States,* 409 U.S. 352. Petitioner does not wish to re-argue the points he made in Question 1 of the Writ. It is apparent, however, that the claim that he spoke the literal truth in response to the examination before the grand jury is well established in the record.

2. Petitioner contends that the Government's portrayal of his trial testimony conveys the impression that he contradicted at trial his Grand Jury testimony concerning the copies of Federal Income tax returns that he brought with him.

Petitioner does not concede that his trial testimony in any way changed the testimony that he presented at the grand jury. The Government characterizes the trial testimony as a turn-around:

> "Petitioner admitted at trial that his testimony was false, and he added that he was not confused when he gave those false answers (Pet. App. A11). He claimed however, that he did not intend to give false testimony but simply forgot what he had done concerning the tax returns (ibid.)" (Gov't. Memo., p. 3)

As argued in the application for Writ, Petitioner contends that he spoke the literal truth in response to the questions before the grand jury. Petitioner pointed out in Question 1 that a careful reading of the questions contained in the Indictment elicited that Petitioner himself recognized that the copies he brought to the Grand Jury might have been ". . . a first retained copy or a copy made at some other time." (Pet. App. p. 8)

Consequently, the Government's claim that "Petitioner admitted at trial that his testimony before the grand jury was false, . . ." (ibid.) is unacceptable. There was no flat statement made before the grand jury that the copies Petitioner testified about were made at a particular time. Thus, there was no testimony for the Petitioner to contradict or deny at the trial.

It is further misleading to cite the hypothetical questions the Government isolates in its Memorandum, p. 5, as the false statements Petitioner made before the grand jury. As phrased—accepting the assumptions that the questioner builds in—the Petitioner has no choice but to answer affirmatively.

> Q. So assuming that Mr. Wamser doesn't have the original or that Mr. Wamser gave you back what you gave him, then this is a copy that was made when you sent it in?
>
> A. Yes.

Q. Of the original and when you prepared it and sent it in in January of '79?

A. Yes.

Q. And likewise on the '79 return, if this is a copy of what Mr. Wamser returned to you, then this is a copy that would have been made in January or the early part of 1980 when this return was sent in and, likewise, the '80 return would have been prepared and sent in the early part of 1981 and this is a copy of that document?

A. Yes. (Gov't. Memo., p. 5)

The affirmative answers do not establish that the copies were the first retained or some other copies. The Government itself can only say that the copies might be one or the other in introducing this exchange.

> "The ensuing questions clarified the fact that these copies the petitioner had in his possession were either copies he had made or copies that Agent Wamser had made from those copies and later returned to Petitioner (id. at A4)." (Gov't. Memo., p. 5)

Without establishing that the copies he testified about were actually made at the time alleged by the Government—between November 30, 1981, and February 27, 1982, the Petitioner has not testified falsely.

1. Because the alleged perjury involved Petitioner's testimony before the Grand Jury, it is imperative to keep in mind that Petitioner was testifying about Government Exhibit 4—the set of copies of 1978 and 1979 Federal Income Tax Returns that he brought to the Grand Jury as ordered by the subpoena served by Agent Wamser. The alleged perjury does not involve the two sets of copies delivered to Agent Wamser in December, 1981, and March,

1982, which are identified as Government Exhibits 1 and 2 respectively.

The Government attempts to link Exhibits 1, 2 and 4 by describing Exhibit 4 as a set of copies made on April 9, 1982, when "Agent Wamser copied the 'March set' (Gov't. Ex. 2) of the returns and sent the copies that he had made to the Petitioner." (Gov't. Memo., p. 2) The record does not substantiate this assertion.

At every opportunity, Petitioner has pointed out that Exhibit 4, the set of copies brought to the Grand Jury, differed from the two sets of copies given previously to Agent Wamser. There is no proof that Exhibit 4 was the copies made on April 9, 1982, though, as the Government cites in its Memorandum (p. 7), Agent Wamser testified that on July 9, 1982, he ". . . inspected them and they *appeared* to be the same copies that I provided to him earlier on April 9, 1982." (Tr. Vol. 1, p. 69, emphasis added) Yet, in the very next question, Agent Wamser states that Petitioner himself recognized that there was some question as to what set of copies he was providing the Agent.

> Q. Mr. Mariens. What, if anything else, did the defendant concerning the '78 and '79 returns, sir, concerning the original documents themselves, the retained copies?
>
> A. Mr. Wamser. I asked him if the copies that he was providing me were the first retained copies, which he stated that he believed they were, and if they weren't they were the copies that I had provided him in April, 1982. (Tr. Vol. 1, p. 69)

Furthermore, Petitioner made the same statement, when he testified *under oath* before the Grand Jury on July 14, 1982. (Pet. App. Appendix A4, Indictment, p. 3)

Is there any evidence at all to substantiate the Government assertion that Exhibit 4, the copies brought to the Grand Jury and testified under oath by the Petitioner, were copies of Exhibit 2 made by Agent Wamser on April 9, 1982?

**No.**

The Government's own expert witness cannot establish a link. When questioned about Exhibit 4, Document examiner James Davidson states that Exhibit 4 ". . . are not copies that were made on the same machine that produced Government's Exhibits 1 (a) through (h) or 2 (a) through (h)." (Tr. Vol. 1, p. 154) Mr. Davidson does not offer any testimony concerning when the copies were made or on what machine.

Certainly Mr. Davidson testifies that Government Exhibits 1 and 2, the copies given previously to Agent Wamser were made between December 7, 1981, and February 27, 1982. The failure to identify Government Exhibit 4 as made during the same period seriously questions the sufficiency of evidence to sustain Petitioner's conviction.

Petitioner believes he established this failure in Question 3 of his Petition for Writ (p. 12, 13, 14) and will not repeat his argument. However Petitioner wishes to correct the Government's assertion, in their attack on Question 3, that the "dates of creation" of Government Exhibit 4 ". . . was altogether irrelevant to any issue in the case because petitioner was alleged to have lied only about the dates of the copies that he had made himself (GX 1, 2)."

Not only does this claim flatly contradict the chain of evidence that the Government has sought to establish

against the Petitioner, it contradicts the charge of the Indictment. The Indictment states specifically the alleged false testimony concerned the copies of ". . . 1978 and 1979 Federal Income Tax Returns that he had provided to an Agent of Internal Revenue Service *and then brought to the Grand Jury. . .*" (Emphasis added, Pet. App., p. A6, A7).

Petitioner respectfully submits that the Government not be allowed to first attempt to link Exhibit 4 to Exhibits 1 and 2; and then contend that the date of creation they attempt to establish is "irrelevant."

## CONCLUSION

We, therefore, urge that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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